No. 15-674

In The Supreme Court Of The United States

UNITED STATES OF AMERICA, ET AL.,

PETITIONERS,

v.

STATE OF TEXAS, ET AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMICUS BRIEF OF THE STATES OF WASHINGTON, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, IOWA, MARYLAND, MASSACHUSETTS, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Department of Homeland Security has long engaged in "a regular practice . . . known as 'deferred action,'" in which the Secretary "exercis[es] [his] discretion" to forbear, "for humanitarian reasons or simply for [his] own convenience," from removing particular aliens from the United States. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999). On November 20, 2014, the Secretary issued a memorandum (Guidance) directing his subordinates to establish a process for considering deferred action for certain aliens who have lived in the United States for five years and either came here as children or already have children who are U.S. citizens or permanent residents.

The questions presented are:

1. Whether a State that voluntarily provides a subsidy to all aliens with deferred action has Article III standing and a justiciable cause of action under the Administrative Procedure Act, 5 U.S.C. §§ 500-596, to challenge the Guidance because it will lead to more aliens having deferred action.

2. Whether the Guidance is arbitrary and capricious or otherwise not in accordance with law.

3. Whether the Guidance was subject to the APA's notice-and-comment procedures.

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INTRODUCTION AND INTERESTS OF AMICI

The immigration guidance enjoined by the courts below is lawful and will substantially benefit States. Nonetheless, the Plaintiff States filed this suit, not because they are suffering any meaningful harm, but rather to achieve a political goal that they could not achieve through the political process. This Court should grant certiorari and reverse.

Amici are the States of Washington, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maryland, Massachusetts, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and the District of Columbia (the amici States). The amici States have a strong interest in this case because the injunction entered below is preventing our States and millions of our residents from receiving the substantial economic, humanitarian, and public safety benefits that will flow from the Guidance. We also add a helpful perspective by rebutting the distorted picture Plaintiffs have offered of the Guidance's impacts on States.

Specifically, the courts below enjoined the Guidance based on alleged violations of the Administrative Procedure Act and the Plaintiffs' claim that the Guidance will irreparably harm them by requiring them to issue more driver's licenses. These holdings are unsupportable.

The reality is that the Guidance is lawful, will substantially benefit States, and will further the public interest. In holding to the contrary, the courts below relied entirely on speculative claims of harm by one Plaintiff—Texas. But Texas' assertions failed to justify an injunction even as to Texas, much less

nationwide. Indeed, several of the Plaintiff States already offer driver's licenses to undocumented immigrants. The injunction protects them from the "irreparable harm" of doing what they already are doing.

More broadly, as the amici States demonstrate below, the Guidance will actually benefit States and further the public interest by allowing qualified undocumented immigrants to come out of the shadows, work legally, and better support their families. This will increase state tax revenue, enhance public safety, and help avoid tragic situations in which parents are deported away from their U.S. citizen children, who are left to rely on state services or extended family. There was no sound basis for the injunction, and this Court should grant certiorari and reverse.[1]

REASONS FOR GRANTING THE PETITION

The United States has ably described the legal errors in the decision below and the conflicts between that decision and this Court's precedent. Rather than reiterating those points, the amici States wish to highlight the enormous importance of this case to States and the grievous errors the courts below made in assessing the real-world consequences of the Guidance.

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[1] Counsel of record for the parties received timely notice of the amici States' intent to file this brief ten days before the due date in compliance with Rule 37.2(a).

A. The Unwarranted Injunction Is Causing Real Harm to States and Our Residents Because We Would Benefit Enormously From the Immigration Guidance

It is essential that this Court take up this case promptly because the injunction entered below is causing immediate, tangible harm to States and our residents, all with no legal basis.

The Guidance enjoined below would result in immediate and important benefits to all States, including Texas. By making qualified undocumented immigrants eligible for deferred action, the Guidance would increase state tax revenue, benefit state economies, enhance public safety, and help families stay together, all vital state interests this Court should consider in evaluating whether to grant certiorari.

When immigrants are able to work legally—even for a limited time—their wages increase, they seek work compatible with their skill level, and they enhance their skills to obtain higher wages, all of which benefit state economies by increasing income and growing the tax base.[2] In Washington State, for example, approximately 105,000 people are likely to be eligible for deferred immigration action under the Guidance.[3] Moving these people into the legal

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[2] *Undocumented Immigrants' State & Local Tax Contributions*, INST. ON TAXATION & ECONOMIC POL'Y (Apr. 15, 2015, 11:45 PM), http://itep.org/itep_reports/2015/04/undocumented-immigrants-state-local-tax-contributions.php#.VlM6W02FOk.

[3] *National and State Estimates of Populations Eligible for Anticipated Deferred Action and DACA Programs*,

workforce would increase Washington's tax revenues by an estimated $57 million over the next five years.[4] California, with an anticipated 1,214,000 people eligible for deferred immigration action, would see tax revenues grow by around $904 million over the next five years.[5] The tax consequences for the Plaintiff States are also positive. For example, if the estimated 594,000 undocumented immigrants eligible for deferred action in Texas receive temporary work permits, it will lead to an estimated $338 million increase in state tax revenue over five years.[6]

While Plaintiffs might quibble with these specific estimates, it is widely accepted that allowing undocumented immigrants to work legally increases tax revenue. For example, the nonpartisan Congressional Budget Office has concluded that stopping the Guidance from taking effect will cost

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MIGRATION POL'Y INST. (2014) (Excel spreadsheet), http://www.migrationpolicy.org/sites/default/files/datahub/US-State-Estimates-unauthorized-populations-executive-action.xlsx (last visited Nov. 30, 2015).

[4] *Executive Action on Immigration Will Benefit Washington's Economy*, CTR. FOR AM. PROGRESS, http://www.scribd.com/doc/247296801/Economic-Benefits-of-Executive-Action-in-Washington (last visited Nov. 30, 2015).

[5] *Topline Fiscal Impact of Executive Action Numbers for 31 States*, CTR. FOR AM. PROGRESS, http://www.scribd.com/doc/248189539/Topline-Fiscal-Impact-of-Executive-Action-Numbers-for-31-States (last visited Nov. 30, 2015).

[6] *Id.*

the federal government roughly $22 billion in lost tax revenue over the next ten years.[7]

In addition to increasing tax revenue, immigrant workers benefit States and the nation in other vital ways. Immigrants entering the labor force are concentrated in important sectors within the "upper and lower tails of the skill distribution."[8] At the upper end, immigrants play a vital role in filling the rising demand for science and engineering workers, as the United States' percentage of PhDs awarded globally has dropped.[9] At the other end, services provided by low-skilled immigrants "benefit[] the native population by decreasing" elements of "the cost of living," with "negligible" effects on low-skilled native workers.[10]

Moving beyond economic benefits, the Guidance will benefit States by improving public safety. Effective local law enforcement depends on a

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[7] Douglas W. Elmendorf, *Budgetary Effects of Immigration-Related Provisions of the House-Passed Version of H.R. 240, An Act Making Appropriations for the Department of Homeland Security*, CONGRESSIONAL BUDGET OFFICE (Jan. 29, 2015), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/hr240.pdf.

[8] David Card, *Immigration and Inequality*, NAT'L BUREAU OF ECON. RES., Working Paper No. 14683, at 5 (Jan. 2009), http://www.nber.org/papers/w14683.pdf.

[9] Richard B. Freeman, *Is A Great Labor Shortage Coming? Replacement Demand in the Global Economy*, NAT'L BUREAU OF ECON. RES., Working Paper No. 12541 (Sept. 2006), http://www.nber.org/papers/w12541.pdf.

[10] Patricia Cortes, *The Effect of Low-Skilled Immigration on U.S. Prices: Evidence from CPI Data*, Journal of Political Economy, Vol. 116, No. 3 (June 2008).

trusting relationship between police and the communities they serve. But that relationship is undermined when undocumented immigrants fear that interactions with the police could lead to their deportation or the deportation of their family or friends.[11] Studies show that people are less likely to report crimes if they fear the police will inquire into their or their family's immigration status,[12] and law enforcement's experience with recipients of U-Visas, a form of temporary legal immigration status, confirms that addressing deportation concerns can encourage undocumented immigrants to cooperate with police.[13] Additionally, the immigration Guidance protects public safety by requiring certain undocumented immigrants to pass criminal and national security background checks.[14]

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[11] Anita Khashu, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties* 24, POLICE FOUND. (Apr. 2009), http://www.policefoundation.org/publication/the-role-of-local-police-striking-a-balance-between-immigration-enforcement-and-civil-liberties/.

[12] Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 5-6, Univ. of Illinois at Chicago, Dep't of Urban Planning and Policy (May 2013), http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.

[13] *See* Natalia Lee et al., *National Survey of Service Providers on Police Response to Immigrant Crime Victims, U Visa Certification and Language Access* 6-7, 13 (Apr. 16, 2013), http://www.masslegalservices.org/system/files/library/Police%20Response%20U%20Visas%20Language%20Access%20Report%20NIWAP%20%204%2016%2013%20FINAL.pdf.

[14] *See, e.g.*, *Fact Sheet: Immigration Accountability Executive Action*, THE WHITE HOUSE (Nov. 20, 2014),

In addition to providing fiscal and public-safety benefits, the Guidance will also lead to other important social benefits, including for the 16 million people living in mixed-status families.[15] One in five undocumented immigrant adults living in the United States has a spouse that is a U.S. citizen or lawful permanent resident, and around 3.8 million undocumented immigrants have children who are U.S. citizens.[16] In California alone, some 1.2 million children are U.S. citizens who live with an undocumented parent.[17] In the first six months of 2011, more than 46,000 parents of U.S. citizen children were deported.[18] Removing an undocumented parent can subject those children to housing instability, food insecurity, and other

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http://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action.

[15] *How Today's Immigration Enforcement Policies Impact Children, Families, and Communities: A View from the Ground* 1, CTR. FOR AM. PROGRESS (Aug. 2012), https://www.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamiliesFINAL.pdf.

[16] *The Facts on Immigration Today* 5, CTR. FOR AM. PROGRESS (Oct. 2014), http://cdn.americanprogress.org/wp-content/uploads/2013/04/ImmigrationFacts-brief-10.23.pdf.

[17] Manuel Pastor et al., *What's at Stake for the State: Undocumented Californians, Immigration Reform, and Our Future Together* 15, UNIV. OF S. CAL. CSII (May 2013), http://dornsife.usc.edu/assets/sites/731/docs/whats_at_stake_for_the_state.pdf.

[18] *How Today's Immigration Enforcement Policies Impact Children, Families, and Communities: A View from the Ground* 1, CTR. FOR AM. PROGRESS (Aug. 2012), https://www.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamiliesFINAL.pdf.

harms.[19] Indeed, many such children are forced into foster care,[20] at significant expense to States.

In short, there is a strong state and public interest in the Court taking up this case quickly and reversing. Until it does so, States are being denied the many benefits described above, and many hard working immigrants are being forced to continue living with the constant fear of being deported and separated from their families.

B. The "Harms" Asserted By Plaintiffs Are Illusory or Self-Inflicted

Despite the forceful evidence that States will actually benefit from the Guidance, Plaintiffs filed this suit. Their claim of harm rests entirely on the notion that the Guidance will force them to issue more driver's licenses. But that "harm" is both invented and irrelevant. It does not justify using the federal courts to achieve a political victory that Plaintiffs could not achieve through the political process.

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[19] Ajay Chaudry et al., *Facing Our Future: Children in the Aftermath of Immigration Enforcement* 27-33, THE URB. INST. (Feb. 2, 2010), http://www.urban.org/uploadedpdf/412020_FacingOurFuture_final.pdf.

[20] Seth Freed Wessler, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* 6, 23, APPLIED RES. CTR. (Nov. 2011), http://www.immigrationresearch-info.org/system/files/Applied_Research_Center---Shattered_Families.pdf.

1. The Immigration Guidance Has No Impact on States' Authority to Regulate State Licenses or Benefits

States—including the Plaintiff States—have adopted a wide range of approaches in deciding whether to grant driver's licenses or other state benefits to undocumented immigrants.[21] The immigration Guidance does nothing to diminish state authority to continue taking a wide range of approaches. Indeed, nothing in the Guidance requires States to do anything at all, including providing licenses or benefits to anyone. States retain authority to shape their laws to limit the availability of state benefits and licenses and to set fees for licenses. 8 U.S.C. § 1621.

Given that States retain the precise authority they had previously to regulate the licenses and benefits available to immigrants, it makes no sense to say that the Guidance injures States by forcing States to issue more licenses or provide more benefits. True, many States may choose to provide licenses to beneficiaries of the Guidance for the same reasons that they provide them to other immigrants who have received deferred action: the substantial

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[21] For example, twelve States (including two Plaintiff States) and the District of Columbia currently provide at least some form of driver's licenses regardless of immigration status. Cal. Veh. Code § 12801.9; Colo. Rev. Stat. § 42-2-502; Conn. Gen. Stat. § 14-36m; Del. Code Ann. tit. 21, § 2711; D.C. Code § 50-1401.05; Haw. Rev. Stat. § 286-104.5; 625 Ill. Comp. Stat. 5/6-105.1; Md. Code Ann., Transp., § 16-22; N.M. Stat. Ann. § 66-5-9A; Nev. Rev. Stat. § 483.291(2)(b); Utah Code Ann. § 53-3-207; Vt. Stat. Ann. tit. 23, § 603(e); Wash. Rev. Code § 46.20.035(3).

benefits that come from reducing the number of unlicensed drivers. But doing so will be a state choice, "not the result of federal coercion." *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997). And States are free to make the opposite choice, so long as any distinctions they draw in issuing benefits or licenses are not irrationally discriminatory and are related to legitimate state interests.

2. Even if Plaintiffs' Self-Inflicted "Harms" Could Prove Injury, They Are Illusory

Plaintiffs' claim of harm rests on the idea that they will incur costs in issuing driver's licenses to beneficiaries of the Guidance. That argument is not only legally irrelevant, as described above, but it is also lacking the sort of factual basis that could justify the extraordinary, nationwide injunction entered here.

To begin with, several of the Plaintiff States already offer driver's licenses to undocumented immigrants.[22] And at least one Plaintiff State, Nevada, has explicitly concluded that offering such licenses *increases* state revenue because the increased fees outweigh new administrative costs.[23]

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[22] *See, e.g.*, Nev. Rev. Stat. § 483.291; Nevada Dep't of Motor Vehicles, Residency and Proof of Identity, http://www.dmvnv.com/dlresidency.htm#non (last visited Nov. 30, 2015); Utah Code Ann. § 53-3-207(7) (allowing issuance of a driving privilege card to persons unable to show proof of lawful presence in the United States).

[23] *See* Fiscal Note, SB 303 (Mar. 29. 2013), http://www.leg.state.nv.us/Session/77th2013/FiscalNotes/5654.pdf; *see also, e.g., Territory of Alaska v. Am. Can Co.*, 358 U.S.

Even in the unknown number of Plaintiff States where licensing fees do not cover administrative costs, those States presumably subsidize driver's licenses in general because they see some offsetting benefit in doing so, such as reducing traffic accidents and increasing rates of insurance coverage.[24] Plaintiffs offered no evidence whatsoever that these benefits would be any smaller in licensing undocumented immigrants.

More broadly, even if some Plaintiff States would incur costs to issue more driver's licenses, those costs are dramatically outweighed by the substantial tax and other benefits States will reap from the Guidance, described above. It was egregious error for the courts below to grant an injunction against the Guidance when the truth is that the Guidance will actually benefit Plaintiffs. *Cf. Diginet, Inc. v. W. Union ATS, Inc.*, 958 F.2d 1388, 1394 (7th Cir. 1992) (Posner, J.) (noting that preliminary relief makes little sense where "the harm to the plaintiff from refusing a preliminary injunction would actually be negative"). This is particularly true because many of the Plaintiff States have vanishingly small undocumented immigrant populations,[25] so their claim of across-the-board

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224, 227 (1959) (permitting federal courts to take judicial notice of the legislative history of a bill).

[24] *See, e.g.*, NAT'L HWY TRAFFIC SAFETY ADMIN., showing reduction in fatality accidents since licensing undocumented aliens in 2005, http://www-nrd.nhtsa.dot.gov/departments/nrd-30/ncsa/STSI/49_UT/2013/49_UT_2013.htm (last visited Nov. 30, 2015).

[25] For example, Montana, North Dakota, South Dakota, and West Virginia are each home to fewer than 5,000

injury from a massive influx of license applicants was and is untenable. *See, e.g.*, *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 108 (D.C. Cir. 1976) ("An injunction must be narrowly tailored to remedy the specific harm shown.").

CONCLUSION

The immigration Guidance will benefit States, not cause harm. Every day the injunction entered below remains in place harms the States and our residents. The petition should be granted.

RESPECTFULLY SUBMITTED.

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